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IN THE

Supreme Court of the United States

IN RE: NED COMER; *et al.*,

Petitioners.

On Petition for a Writ of Mandamus to the United States Court of Appeals for the Fifth Circuit

CERTAIN RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTION

Petitioners bring tort claims against selected oil, energy, chemical, and coal companies alleging the companies are liable for causing damage from Hurricane Katrina. With their claims dismissed by the district court as nonjusticiable political questions and for lack of standing, and their appeal dismissed by the Fifth Circuit because the *en banc* court concluded it had lost its quorum, petitioners ask this Court for a writ of mandamus sending this case back to the three-judge panel that is the only body saying their claims can proceed.

Rather than seek the conventional remedy of certiorari review of the merits of their claims, petitioners ask for the "drastic and extraordinary" remedy of mandamus. *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (quoting *Ex Parte Fahey*, 332 U.S. 258, 259-60 (1947)). Rather than ask for the case to be sent back to the *en banc* court for rehearing, petitioners ask to return to the panel that ruled in their favor.

Mandamus is available only when three requirements are met: (1) no other adequate means exist to attain the relief sought; (2) there is a "clear and indisputable" right to the writ; and (3) "the writ is appropriate under the circumstances." *Id.* at 380-81 (internal citations and quotations omitted). Petitioners do not and cannot meet these requirements.

Petitioners do not meet the first requirement because there are other avenues of relief. Petitioners could have sought certiorari review under Supreme Court Rule 10 of either the *en banc* Fifth Circuit's dismissal of their claims on procedural grounds or the district court's dismissal of their claims on the merits. They made a strategic decision to do neither.

Petitioners do not establish that their right to mandamus is "clear and indisputable." *Id.* at 381. The right to mandamus is not indisputable where it turns on an uncertain question of law. Petitioners assert this case is "unprecedented," which alone is fatal to meeting this requirement. Pet. 26. And, there is contrary authority directly supporting the *en banc* court's dismissal of the case in *Chrysler Corp. v. United States*, 314 U.S. 583 (1941) ("*Chrysler I*"), where this Court dismissed an appeal for lack of qualified Justices to constitute a quorum. The right to mandamus is likewise not clear when the conduct at issue is a matter of discretion, unless there is a clear and indisputable abuse of discretion. The Fifth Circuit did not abuse its discretion in applying its local rules to vacate the panel decision and in dismissing the appeal below. Its decision to dismiss is also fully supported by this Court's precedent.

Petitioners fail to show that mandamus is appropriate under the circumstances here where they have taken self-contradictory positions unsupported by law regarding the authority of the *en banc* court and the panel. Petitioners acknowledge that when the *en banc* court granted rehearing, Fifth Circuit Rule 41.3 automatically vacated the panel opinion. Pet. 30. At the same time, they argue that Rule 41.3 never stripped the three-judge panel of its authority to take "necessary action," including to

rehear the case or reinstate its original decision. Pet. 21. These two positions cannot be squared. Likewise, petitioners' position that the *en banc* court lost its quorum after granting rehearing, and therefore the authority to act (Pet. 17), is inconsistent with their position that the *en banc* court retained the authority to suspend Rule 41.3 and return the case to the panel. Pet. 31.

In asking the Court to return the case to the three-judge panel, petitioners omit that the *en banc* court had several alternative options for proceeding. Those options include invoking the Rule of Necessity to set aside disqualifications, assigning an active circuit judge from another circuit, or staying the case until a quorum is restored.

The Court should not convert the petition to one for certiorari. Petitioners have expressly disavowed an interest in certiorari relief. They made the strategic decision not to seek certiorari review of the procedural ruling or the merits of their claims and should be held to that decision. Further, the petition fails the test for certiorari review because the Fifth Circuit's decision is fully consistent with *Chrysler I* and does not conflict with decisions in other circuits.

STATEMENT

1. On September 20, 2005, shortly after Hurricane Katrina, petitioners brought suit in federal court. Pet. 9. The operative Third Amended Complaint alleges state law claims against respondents for public and private nuisance, trespass, negligence, unjust enrichment, and fraud on behalf of a putative class of Mississippi residents and property owners. Record ("R.") 761-64.

The claims are premised on the following theorized chain of causation: (1) respondents' lawful

conduct resulted ultimately in greenhouse gas emissions over many decades; (2) which, coupled with the emissions of untold billions of other companies, individuals and other actors worldwide, contributed to alleged global warming; (3) which in turn caused ocean and air temperatures to rise; (4) which in turn increased the possibility and intensity of hurricanes forming in the Atlantic Ocean; (5) which in turn contributed to Hurricane Katrina's intensity by some unspecified degree; and (6) which increased intensity ultimately caused petitioners to suffer alleged unspecified injuries, including damage to unspecified properties in Mississippi. R. 748-53, 755-56.

2. On August 30, 2007, the district court dismissed petitioners' claims for lack of subject matter jurisdiction, holding the claims nonjusticiable under the political question doctrine because they asked the district court "to balance economic, environmental, foreign policy, and national security interest[s] and make an initial policy determination of a kind which is clearly nonjudicial." Transcript of Aug. 30, 2007 Hearing on Coal Company Defendants' Motion to Dismiss at 40. The district court also found that petitioners lacked Article III standing, reasoning that their alleged injuries were not "fairly attributable to these individual defendants" but instead were "attributable to a larger group that are [sic] not before this Court, not only within this nation but outside of our jurisdictional boundaries as well." *Id.* at 36. On October 16, 2009, a three-judge panel of the Fifth Court reversed in part, concluding that petitioners had standing to assert their claims of public and private nuisance, trespass, and negligence, and that these claims did not present nonjusticiable political questions. *Comer v. Murphy Oil USA*, 585 F.3d 855,

860 (5th Cir. 2009) ("*Comer I*").[1] Judge Davis specially concurred, joining the panel's ruling on standing and its outcome on the political question doctrine but indicating that he would have affirmed the district court's dismissal on the alternative ground that petitioners had failed to state a claim under common law because they failed "to allege facts that could establish that the [respondents'] actions were a proximate cause of the [petitioners'] alleged injuries." *Id.* at 880.

3. Respondents petitioned for rehearing *en banc*. On February 26, 2010, the Fifth Circuit issued an order stating that "a majority of the circuit court judges in regular active service and not disqualified voted in favor" of granting respondents' petitions. *Comer v. Murphy Oil USA*, 598 F.3d 208, 210 (5th Cir. 2010). The order noted that seven of the court's 16 active judges were recused and did not participate. *Id.* at 210 n.1. By operation of Fifth Circuit Rule 41.3, because the order granting *en banc* review did not provide otherwise, the order vacated the panel's opinion and stayed the mandate.

4. On April 30, 2010, the clerk of the Fifth Circuit notified the parties that since the time the *en banc* court was constituted new circumstances had arisen requiring another judge to recuse, leaving only eight members of the court able to participate in the case and thereby causing the *en banc* court to conclude it had lost its quorum and was

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[1] The panel dismissed on prudential standing grounds petitioners' claims for unjust enrichment, fraudulent misrepresentation, and civil conspiracy, finding that they raised "a generalized grievance" shared by "the American public." *Comer I*, 585 F.3d at 868.

"preclude[ed] . . . from acting on the merits of the case." Letter of Fifth Circuit Office of the Clerk at 1, *Comer v. Murphy Oil USA*, No. 07-60756 (5th Cir. April 30, 2010). On May 6, 2010, the clerk of the court requested that the parties submit letter briefs addressing how the court should proceed. Pet. App. 44. The court directed the parties to several rules, statutes, and cases, but invited them to "address the matter as they think appropriate." *Id.*

Respondents maintained that the *en banc* court still had a quorum, but that, even if it did not, the court had several options for proceeding, including requesting the appointment of an active judge from another circuit to serve on the *en banc* court and invoking the Rule of Necessity to disregard disqualifications. Resp. C.A. Letter Br. 1-11. Respondents argued in the alternative that if the court rejected all of these options, the proper result, under *Chrysler I*, would be to dismiss the appeal and leave the district court's decision intact. *Id.* at 12. Petitioners took a starkly different position—that the court had only one option, to return the case to the three-judge panel that had ruled in their favor. Pet. C.A. Letter Br. 1-12.

5. On May 28, 2010, five of the eight remaining non-recused judges of the *en banc* court issued a *per curiam* order stating that because the court had concluded it lacked a quorum, it could not conduct judicial business with respect to petitioners' appeal. It directed the clerk to dismiss the appeal. *Comer v. Murphy Oil USA*, 607 F.3d 1049, 1055 (5th Cir. 2010) ("*Comer II*"). The order addressed and rejected several options proffered by respondents and noted the absence of any rule enabling the *en banc* court to reinstate the vacated panel opinion. *Id.*

Judge Davis dissented, joined by Judge Stewart, maintaining that dismissal was inappropriate and that the *en banc* court should have requested appointment of a judge from another circuit to enable the court to consider the case *en banc*. *Id.* at 1056. Judge Dennis separately dissented, disagreeing with the majority's view that it did not have a quorum, insisting that the court had a categorical duty to decide the case, and asserting that the *en banc* court should have applied the Rule of Necessity, requested appointment of a judge from another circuit, or held the case over until such time as the *en banc* court had a quorum *Id.* at 1058-66.

ARGUMENT

I. There Is No Basis For The Extraordinary Remedy Of Mandamus.

Mandamus is rarely to be granted because it "is a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney*, 542 U.S. at 380 (quoting *Ex Parte Fahey*, 332 U.S. 258, 259-60 (1947)); Sup. Ct. R. 20.1 (noting that extraordinary writs are "not a matter of right, but of discretion sparingly exercised"). To obtain mandamus three requirements must be met: (1) "no other adequate means [exist] to attain the relief"; (2) the "right to issuance of the writ is clear and indisputable"; and (3) "the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 380-81 (internal citations and quotations omitted). Petitioners meet none of these requirements.

A. Petitioners Do Not Establish That There Are No Other Adequate Means For Relief.

1. There Are Other Avenues Of Relief.

The rule barring mandamus where alternative relief is available is "designed to ensure that the writ will not be used as a substitute for the regular appeals process." *Id. at* 380-81; *see also Will v. United States*, 389 U.S. 90, 97 (1967) ("Mandamus, of course, may never be employed as a substitute for appeal . . . ."). This rule applies where, as here, a party is able to seek certiorari review, whether it sought that review or not. *See In re Nat'l Park Bank of N.Y.*, 256 U.S. 131, 133 (1921) (denying writ of mandamus to compel Fifth Circuit to modify its final ruling where party could have sought certiorari review); Sup. Ct. R. 20.1 (to justify the granting of any extraordinary writ, "the petition must show . . . that adequate relief cannot be obtained in any other form.").

Petitioners had at least two other avenues of relief, but made a strategic decision to pursue neither. They could have sought certiorari review of the decision of the Fifth Circuit to dismiss on procedural grounds for lack of a quorum. *See United States v. Am.-Foreign Steamship Corp.*, 363 U.S. 685, 685-86 (1960) (determination of whether *en banc* court was properly constituted subject to certiorari review). They also could have sought certiorari review of the merits decision of the district court. Because there were other adequate means of relief, mandamus is not warranted. *See In re Nat'l Park Bank of N.Y.*, 256 U.S. at 133.

2. Petitioners' Contrary Arguments Are Without Merit.

Petitioners' argument that Supreme Court Rule 10 bars certiorari review of cases "for which the court of appeals did not reach a decision" is unfounded. Pet. 23. Rule 10 merely sets forth "[c]onsiderations [g]overning [r]eview on [c]ertiorari" and emphasizes that the circumstances listed are "neither controlling nor fully measuring the Court's discretion" to grant review. Sup. Ct. R. 10. The Court in fact is empowered to review a case at any time "before judgment has been rendered in the court of appeals," and has done so before. 28 U.S.C. § 2101(e); Sup. Ct. R. 11; *see also United States v. Nixon*, 418 U.S. 683, 690-92 (1974) (directly reviewing final order of district court). It could have done so here.

Petitioners' argument that mandamus is necessary to correct the *en banc* court's purported "failure to exercise jurisdiction," also misses the mark.[2] Pet. 24. This case is not about the exercise of jurisdiction. The authority of circuit courts to adjudicate cases is subject not only to jurisdictional requirements but also to 28 U.S.C. § 46, which governs the composition and number of appellate judges necessary to render a decision. *See Nguyen v. United States*, 539 U.S. 69, 80-82 (2003). In *Nguyen*, this Court held that an improperly constituted appellate panel had no authority to render a decision, even though there was no quarrel over

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[2] Petitioners also half-heartedly suggest that "[r]ecusals are a particularly proper issue for mandamus consideration" (Pet. 24), but then challenge none of the recusal decisions made in the court below. *See id.* at 35.

subject matter or personal jurisdiction in that case. *See id.*; *see also Am.-Foreign Steamship*, 363 U.S. at 691 (vacating judgment by improperly constituted *en banc* panel under 28 U.S.C. § 46, without reaching issue of jurisdiction). Likewise, the *en banc* court here never addressed the issues of subject matter or personal jurisdiction. Instead, following *Nguyen*, it determined that it lacked the quorum necessary to render a binding decision, as required under 28 U.S.C. § 46. *Comer II*, 607 F.3d at 1054-55.

Petitioners further argue that mandamus is appropriate where a court concludes that it cannot adjudicate the merits of an appeal without a properly constituted panel. Yet their authorities—*Cheney*, 542 U.S. at 372; *Will*, 389 U.S. at 95; *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)—undercut this position. None of those decisions granted mandamus, and all reiterated the well-settled rule that mandamus may not be employed as a substitute for appeal. *See Cheney*, 542 U.S. at 380-81; *Will*, 389 U.S. at 97; *Holland*, 346 U.S. at 383; *Roche*, 319 U.S. at 27-28.

B. Petitioners Do Not Establish Their Right To Mandamus Is "Clear And Indisputable."

Petitioners cannot meet the requirement of a "clear and indisputable" right to mandamus for several reasons.

1. The Petition Presents An Uncertain Issue Of Law.

A right to mandamus is not "clear and indisputable" where it turns on an uncertain issue of law. *See In re Hussein Lufti Bey*, 256 U.S. 616, 619 (1921) (denying writ of mandamus because the case

involved a novel issue of admiralty law where jurisdiction was "not plain but debatable"). Petitioners assert that "this case is unprecedented" and that they "could find no similar instance where a court of appeals utterly refused to hear an appeal of right." Pet. 26. In doing so, petitioners effectively concede that their petition asserts an uncertain issue of law inappropriate for mandamus relief. *See In re Hussein Lufti Bey*, 256 U.S. at 619.

Further, there is persuasive authority contrary to petitioners' assertion of "clarity." In *Chrysler I*, 314 U.S. at 583, the Court ordered that a direct appeal of right "be dismissed for want of a quorum of Justices qualified to sit in it." Petitioners argued *Chrysler I* before the *en banc* court, explaining:

> [*Chrysler I*] involved a direct appeal from the district court to the Supreme Court as allowed for the speedy adjudication of certain equity actions under the Anti-Trust Act. As such, the Supreme Court was the only court to which the aggrieved party could appeal.

Pet. C.A. Letter Br. 11; *see also Chrysler Corp. v. United States*, 316 U.S. 556, 559-60 (1942) ("*Chrysler II*") (explaining procedural history of *Chrysler I*). Tellingly, petitioners' mandamus petition does not even mention *Chrysler I*.

Petitioners' concession below—that under *Chrysler I* a court lacking a quorum may dismiss an appeal and leave the district court judgment intact—dispels any notion that the law is settled in their favor. It also dispels any notion that the *en banc* court's dismissal of their appeal was incorrect under the law. Under these circumstances, petitioners

cannot establish that their right to mandamus relief is "clear and indisputable."[3]

2. The *En Banc* Fifth Circuit Did Not Abuse Its Discretion.

Mandamus is not "clear and indisputable" where the conduct complained of is a matter of discretion, unless there is an abuse of discretion. *See, e.g.*, *United States ex rel. McLennon v. Wilbur*, 283 U.S. 414, 420 (1931). Petitioners contend that the court below "abused its discretion" in interpreting and following its local rules on *en banc* proceedings. *See* Pet. 21, 27-29. But appellate courts are free to devise their own local rules governing procedures for *en banc* proceedings. *Am.-Foreign Steamship*, 363 U.S. at 688; *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 250, 257 (1953). This Court has instructed that "[t]he interpretation of [a] local rule . . . is a matter on which we should defer to [courts of appeal]." *Henderson v. United States*, 476 U.S. 321, 328 n.9 (1986). Petitioners do not and cannot contend that the *en banc* court arbitrarily ignored or misinterpreted Fifth Circuit Rule 41.3, which states plainly that "the granting of a rehearing *en banc*

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[3] After *Chrysler I*, Congress enacted a general statute for the disposition of direct appeals to this Court when a quorum is lacking, which permits the Chief Justice to remit the matter to the court of appeals to be heard by an *en banc* panel or a special panel of the three most senior judges. 28 U.S.C. § 2109. There is no similar statute for *en banc* courts of appeal confronted with a lack of quorum, and thus *Chrysler I* remains instructive as to the proper procedure in the absence of such a statute.

vacates the panel opinion and judgment of the court and stays the mandate." 5th Cir. R. 41.3.[4]

The action of the *en banc* court dismissing petitioners' appeal for lack of a quorum was the proper course of action and is consistent with *Chrysler I*. It was not a clear and indisputable abuse of discretion.

3. Petitioners' Constitutional And Statutory Arguments Lack Merit.

Petitioners maintain that the *en banc* court's proper application of Rule 41.3 was nonetheless an abuse of discretion because it purportedly deprived them of a constitutional right to an appeal. Pet. 15-17, 30. But "[i]t is well settled that there is no constitutional right to an appeal." *Abney v. U. S.* 431 U.S. 651, 656 (1977); *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996). Likewise, "as frequently determined by this [C]ourt, the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance." *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 80 (1930); *see also, e.g., McKane v. Durston*, 153 U.S. 684, 687 (1894) (the right to appeal is not a "necessary element of due process of law"). Petitioners do not contend that they were denied due process rights in the district court proceedings.

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[4] As petitioners note, Fifth Circuit Rule 41.3 is consistent with the local rules of the Fourth, Fifth, Sixth and Eleventh Circuits. Pet. 16 n.29. It is also consistent with the internal operating procedures of the D.C., First, Third and Seventh Circuits. *See* D.C. Cir. Handbook of Practice and Internal Procedures, XIII(B)(2); First Cir. IOP, X(D); Third Cir. IOP 9.5.9; Seventh Cir. IOP 5(e).

Equally unavailing is petitioners' assertion that Rule 41.3 denies equal protection to litigants in the Fifth Circuit by automatically vacating panel decisions when a request for an *en banc* rehearing is granted. Pet. 16. Rule 41.3 is neutral on its face; petitioners concede the rational purpose for the rule; and they do not contend that it is administered in a discriminatory way against any class of person. *See* Pet. 30. "General rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with" the Equal Protection Clause of the Fourteenth Amendment. *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979). Dissatisfaction with a neutral application of a local rule does not amount to unequal treatment. "[T]he Fourteenth Amendment guarantees equal laws, not equal results." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979).

Finally, petitioners contend that the dismissal below denied them their statutory right of appeal under 28 U.S.C. § 1291. Pet. 15, 24. This argument fails because any wound petitioners have suffered is self-inflicted; petitioners made the strategic choice not to seek certiorari review. *See In re Nat'l Park Bank of New York*, 256 U.S. at 133. And, as *Chrysler I* shows, any right to appeal under 28 U.S.C. § 1291 is subject to all other laws governing the judiciary's authority to hear and decide appeals, including laws governing the composition of an *en banc* court. *See Chrysler I*, 314 U.S. at 583. A statutory right of appeal cannot confer authority on the courts where none exists.

C. Petitioners Do Not Establish That Mandamus Is Appropriate Under The Circumstances.

Petitioners assert that the circumstances of this case are "extraordinary" because the *en banc* court "abrogated its duty to the litigants" when it applied its own local rule and dismissed their claims.[5] *See* Pet. 25. But petitioners agree with the *en banc* court on the two key legal principles that compelled dismissal of their appeal. By petitioners' own account, Fifth Circuit Rule 41.3 "automatically 'vacate[d] the panel opinion and judgment of the court.'" Pet. 30 (quoting 5th Cir. R. 41.3). Petitioners likewise concede that after the panel's decision was vacated, "[t]he *en banc* court lacked a quorum, and therefore lacked the authority to act." Pet. 17. The *en banc* court agreed with petitioners on both points in dismissing their appeal. *See Comer II*, 607 F.3d at 1053-54. Petitioners now take a self-contradictory position against that outcome, which is unsupported by law.

Petitioners contend that because the *en banc* court lost its quorum, it lacked authority to do *anything*, including to dismiss their case. Pet. 17. This Court held otherwise in *Chrysler I*, where, as petitioners conceded below, this Court dismissed for

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[5] Petitioners also suggest, without authority, that the purported publicity surrounding this case makes this case "extraordinary" for purposes of the mandamus standard. Pet. 26. Whether to issue a writ of mandamus is a decision governed by the rule of law, not a rule of publicity. *Cf. Cheney*, 542 U.S. at 372, 390-91 (declining request for writ of mandamus to modify or dissolve trial court's discovery orders in suit against the Vice President and a national energy policy group established by the President).

a lack of a quorum of qualified Justices.[6] *Chrysler I*, 314 U.S. at 583.

Petitioners also maintain that although the *en banc* court had no authority to act once it lost its quorum, the application of Rule 41.3 never stripped the three-judge panel of the "authority to take necessary action," including authority to rehear the case or to reinstate its original opinion. Pet. 21. The panel's power to adjudicate the case is not governed by Rule 41.3, however, but by 28 U.S.C. § 46(c), which provides that cases on appeal

> shall be heard and determined by a court or panel of not more than three judges . . . *unless* a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service.

28 U.S.C. § 46(c) (emphasis added). Circuit courts construe the plain terms of this statute to mean that when a "rehearing before the court *en banc* is ordered," the three-judge panel is no longer authorized to "hear[] and determine[]" a case. *Id.*; *see also Cooey v. Bradshaw*, 338 F.3d 615, 616 (6th Cir. 2003) (*en banc*) (Clay, J., concurring) (authority of panel superseded by *en banc* court); *accord Summerlin v. Stewart*, 309 F.3d 1193, 1193 (9th Cir. 2002) ("When a case is heard or reheard *en banc*, the *en banc* panel assumes jurisdiction over the entire

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[6] Petitioners also argue that the power of courts to dismiss is limited by Federal Rules of Appellate Procedure 3 and 4. Pet. 20. While those rules, which govern when and how appeals are taken, permit dismissal on certain procedural grounds, they do not purport to provide an exhaustive list of grounds for dismissal. *See* Fed. R. App. P. 3, 4.

case."). There is no authority for the proposition that once an *en banc* court is formed, the three-judge panel retains separate, concurrent authority over the disposition of the appeal. Indeed, Judge Dennis, who dissented from the *en banc* order below, rejected petitioners' theory. *Comer II*, 607 F.3d at 1061 (Dennis, J., dissenting) ("[T]he *en banc* court, rather than the panel, has control over the case . . . .").

Petitioners urge finally that the *en banc* court should have exercised its discretion to suspend Rule 41.3 pursuant to Rule 2 of the Federal Rules of Appellate Procedure. Pet. 31. Yet that argument is inconsistent with petitioners' separate assertion that the *en banc* panel lacked authority to take any action at all. Pet. 17. Petitioners' argument is also wrong for two reasons.

First, the panel opinion had already been vacated by operation of Rule 41.3 by the time the *en banc* panel considered the quorum issue, so "suspending" Rule 41.3 at that point would have had no effect. The only way the *en banc* court could have reinstated the panel opinion was by affirmatively voting to do so—a judgment that would have required a quorum.

Second, the language of Rule 2 refers only to suspension of "these rules"—*i.e.*, the Federal Rules of Appellate Procedure. Petitioners point to no authority indicating that the phrase "these rules" in Rule 2 encompasses circuit court local rules, and none can be found.

II. There Are Options For Restoring A Quorum And Allowing The *En Banc* Court To Address The Merits.

Once the *en banc* court concluded that it had lost its quorum, dismissal of the appeal was both proper

and consistent with *Chrysler I*. There are, however, other alternative options for proceeding before the *en banc* court, all of which preclude the specific relief petitioners seek—returning the case to the three-judge panel.

American-Foreign Steamship, where a decision of a three-judge panel of the Second Circuit upholding a lower court's dismissal was withdrawn after an *en banc* rehearing, is instructive here. *Am.-Foreign Steamship*, 363 U.S. at 686-87. At issue before this Court was whether the participation of an ineligible judge deprived the *en banc* court of authority to adjudicate the matter and replace the panel's decision with its own. *Id.* at 686. Upon concluding that the *en banc* court lacked such authority, the Court did not reinstate the original panel—as petitioners request here—but instead remanded the matter to the *en banc* court for further proceedings by a properly constituted court. *Id.* at 691; *see also Am.-Foreign Steamship v. United States*, 291 F.2d 598 (2d Cir. 1961) (on remand, reconvening *en banc* court to address merits).

Likewise, there are several viable options here for satisfying the quorum requirement and permitting the *en banc* court to decide the merits of the case.[7] Petitioners cite no authority for reinstating the appeal and returning it to the

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[7] On September 30, 2010, Judge Jacques J. Wiener, Jr. took senior status. As a result, it appears that the *en banc* court currently consists of 15 circuit judges in regular active service and has a quorum of eight non-recused judges in regular active service available to adjudicate the appeal under both the *en banc* court's and the petitioners' interpretations of § 46(d)'s quorum requirement. *See Comer II*, 607 F.3d at 1054; Pet. C.A. Letter Br. 2-3.

original three-judge panel for final adjudication, and they concede that such an order is unnecessary if the *en banc* court satisfies the quorum requirement. *See* Pet. 36 ("*If* the Fifth Circuit still lacks a quorum to rehear the case en banc, then petitioners ask this Court to order the Fifth Circuit to . . . return the case to the three-judge panel to decide the appeal.") (emphasis added).

A. A Quorum May Be Achieved By Invoking The Rule Of Necessity.

One option for resolving the lack of a quorum is to invoke the "ancient Rule of Necessity." *United States v. Will*, 449 U.S. 200, 212 (1980). Under this long-settled rule of practice, a judge who is disqualified must nonetheless participate in the decision of the case "if it cannot be heard otherwise." *Id.* at 213 (quoting F. Pollack, A First Book of Jurisprudence 270 (6th ed. 1929)).

The *en banc* court declined to adopt this rule because it deemed it inappropriate to disregard disqualification of recused judges given that petitioners might eventually present the matter to this Court. *Comer II*, 607 F.2d at 1055. But the same could be said of virtually any federal appellate proceedings. If such an approach were accepted, it would effectively abolish the use of the Rule of Necessity in the circuit courts of appeal even though this Court has never indicated that its use is confined to the district courts.

The *en banc* court also declined to invoke the Rule of Necessity because there is no fixed method for selecting one particular judge among the several disqualified judges. *Id.* Other courts faced with similar circumstances, however, have exercised their discretion to fashion appropriate solutions to fit the

circumstances. Some courts, for instance, have allowed the most compelling grounds for recusal to stand while setting aside recusals based on other grounds. *See Bolin v. Story*, 225 F.3d 1234, 1239 (11th Cir. 2000) (where plaintiff sued all judges of the court save one, applying Rule of Necessity to set aside recusals only of judges who had not been involved in plaintiff's prior appeals). Others have set aside all disqualifications. *See In re Wireless Tel. Radio Frequency Emissions Prods. Liability Litig.*, 170 F. Supp. 2d 1356, 1358 n.4 (J.P.M.L. 2001). There is no reason to conclude that the *en banc* court cannot exercise its discretion to devise a fair and rational method of applying the Rule of Necessity here.

Petitioners assert that the Rule of Necessity is barred by the "strict" provisions of 28 U.S.C. § 455. Pet. 35. That notion is flatly contradicted by *Will*, which specifically held that the Rule of Necessity may be invoked to override § 455. *Id.* at 217 ("We therefore hold that § 455 was not intended by Congress to alter the time-honored Rule of Necessity."). Equally unavailing is petitioners' theory that there is no compelling need to apply the Rule of Necessity given their supposition that the three-judge panel never lost control over the case. Pet. 35. This theory is refuted by the plain terms of 28 U.S.C. § 46(c) and by circuit court authority, and was rightly not advanced by Judge Dennis in his dissent below. *See, e.g.*, 28 U.S.C. § 46(c); *Cooey*, 338 F.3d at 616; *Comer II*, 607 F.3d at 1061.

B. A Quorum May Be Achieved By Assigning An Active Circuit Judge From Another Circuit.

The *en banc* court could also satisfy the quorum requirement by requesting that the Chief Justice

temporarily assign an active circuit judge from another circuit. Congress has provided that "[t]he Chief Justice of the United States may, in the public interest, designate and assign temporarily any circuit judge to act as a circuit judge in another circuit upon request by the chief judge or circuit justice of such circuit." 28 U.S.C. § 291(a). By its plain terms, this section authorizes the Chief Justice to assign an active circuit judge of another circuit to act as a circuit judge in the proceedings below. A judge assigned pursuant to § 291(a) "shall have *all* the powers of a judge of the court, circuit or district to which he is designated and assigned." 28 U.S.C. § 296 (emphasis added).

Citing the Fifth Circuit's decision in *United States v. Nixon*, 827 F.2d 1019 (5th Cir. 1987), the *en banc* court declined to request a temporary circuit judge on the belief that § 291 is inapplicable to *en banc* proceedings. *Comer II*, 607 F.3d at 1054. *Nixon* held only that an out-of-circuit judge may not decide whether to *grant* a rehearing *en banc*. It did not address whether such a judge may decide a matter once the decision to grant rehearing has been made. *Nixon*, 827 F.2d at 1021-22.

That distinction matters because, although § 46(c) limits the eligibility to vote on *whether* to rehear a case *en banc* to the "circuit judges *of the circuit* who are in regular active service" (28 U.S.C. § 46(c) (emphasis added)), there is no similar restriction as to which judges may later decide the merits of the case *en banc*. In describing the judges who may decide an *en banc* case, § 46(c) omits the phrase "of the circuit" and simply provides that (with exceptions not relevant here) the *en banc* court "shall consist of all circuit judges in regular active service." 28 U.S.C. § 46(c). This omission is significant, given

that a prior version of § 46(c) provided that "'[a] court *en banc* shall consist of all active judges *of the circuit*.'" *Am.-Foreign Steamship*, 363 U.S. at 685-86 (quoting earlier version of § 46(c)) (emphasis added). This "change in language [must] be read, if possible, to have some effect." *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 263 (1992). The logical effect of the omission is to permit a temporarily-assigned judge to decide a case once the decision to grant rehearing has been made.[8]

Petitioners' argument that appointing a *temporary* judge from another circuit would "apparently violate separation of powers" raises no genuine doubts about the constitutionality of § 291(a). Pet. 33. No suggestion has been made that § 291(a) should be invoked to permanently assign a judge to the Fifth Circuit. *See Miller v. French*, 530 U.S. 327, 336 (2000) (acts of Congress are to be construed to avoid doubts as to their constitutionality, wherever "'fairly possible'" to do so) (quoting *Communications Workers v. Beck*, 487 U.S. 735, 762 (1988)). Petitioners' argument that it

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[8] The distinction drawn by § 46(c) between judges who decide whether to grant a rehearing *en banc* and judges who later decide the merits on rehearing is logical. The decision whether to rehear a case "is essentially a policy decision of judicial administration." *Moody v. Albermarle Paper Co.*, 417 U.S. 622, 627 (1974). Thus, it is reasonable to confine the decision to judges within the circuit. But once a rehearing has been granted, disposition of the case is not a matter of policy, but instead is simply a matter of the correct resolution of questions of law. *See id.* ("[V]oting on the merits of an in banc case is quite different from voting whether to rehear a case in banc . . . .").

would be inappropriate for a judge from another circuit to "decide what the law will be in the Fifth Circuit" (Pet. 33) is equally unpersuasive. The result that petitioners warn against is precisely the result contemplated by § 291(a). *See* 28 U.S.C. § 291(a) ("The Chief Justice of the United States may . . . designate and assign temporarily any circuit judge to act as a circuit judge in another circuit . . . .").

C. A Quorum May Be Achieved By Staying The Case Until A Quorum Is Restored.

A third option for resolving the loss of a quorum comes from this Court's decision in *North American Co. v. SEC*, 320 U.S. 708 (1943), where, after four Justices determined that they were disqualified from participating in the decision, the Court transferred the case to a special docket and stayed further proceedings until it had a quorum. *Id.* at 708-09. Petitioners agree that this is a legitimate option. Pet. 31-33.

The *en banc* court declined this approach out of concern about delaying disposition of the case. *Comer II*, 607 F.3d at 1054-55. Yet *North American* was stayed for approximately two years before being taken up again by this Court. *See N. Am. Co. v. SEC*, 327 U.S. 686 (1946). Even extended delay is insufficient grounds for declining to exercise this option.[9]

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[9] Nor is it likely that any delay in this case would be nearly as long as was the case in *North American* because, as petitioners point out (Pet. 32), the President has nominated a judge to fill the vacancy in the Fifth Circuit that existed when the *en banc* court dismissed petitioners' appeal.

III. The Mandamus Petition Should Not Be Converted To A Certiorari Petition.

Petitioners note in a footnote that the Court has authority to convert a mandamus petition to a certiorari petition. Pet. 25 n.49. There are no grounds to do so in this case.

First, petitioners explicitly disclaim any interest in certiorari review by insisting that a writ of mandamus "is the proper remedy in this case." Pet. 25 n.49. Second, petitioners made a knowing, strategic decision not to seek certiorari relief, even though they acknowledged the availability of such relief in the court below. Pet. C.A. Letter Br. 9. They should be bound by that decision. Third, the result the *en banc* court reached—dismissal of the petitioners' appeal for lack of a quorum—is fully consistent with *Chrysler I* and does not conflict with decisions of other circuits. The established bases for certiorari are not present.

CONCLUSION

The petition for writ of mandamus should be denied.

November 29, 2010 Respectfully submitted,

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APPENDIX

APPENDIX

STATUTORY AND REGULATORY PROVISIONS INVOLVED

28 U.S.C. § 291:

Circuit judges

(a) The Chief Justice of the United States may, in the public interest, designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon request by the chief judge or circuit justice of such circuit.

(b) The chief judge of a circuit or the circuit justice may, in the public interest, designate and assign temporarily any circuit judge within the circuit, including a judge designated and assigned to temporary duty therein, to hold a district court in any district within the circuit.

28 U.S.C. § 296:

Powers upon designation and assignment

A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.

Such justice or judge shall have all the powers of a judge of the court, circuit or district to which he is designated and assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices. However, a district judge who has retired from regular active service under section 371 (b) of this title, when designated and assigned to the court to which such judge was appointed, having performed in the preceding calendar year an amount of work equal to or months, and having elected to exercise such powers, shall have the powers of a judge of that court to participate in appointment of court officers and magistrate judges, rulemaking, governance, and administrative matters.

A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters.

28 U.S.C. § 2101:

Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under section 1253 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final

order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of

certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(g) The time for application for a writ of certiorari to review a decision of the United States Court of Appeals for the Armed Forces shall be as prescribed by rules of the Supreme Court.